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IN THE

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

STATE OF NEBRASKA,

Defendant.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR DEFENDANT IN OPPOSITION AND APPENDIX

PAUL L. DOUGLAS
Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Attorney for Defendant.

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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JURISDICTION

The original jurisdiction of this Court has been invoked, pursuant to Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U. S. C. § 1251.

QUESTIONS PRESENTED

1. Whether this Court should exercise its original jurisdiction in an action brought by a state when an action is pending involving the same issues brought by that state in its own courts.

2. Whether this Court should exercise its original jurisdiction in a boundary dispute brought by one state against another where the complaining state has long acquiesced in the exercise of acts of sovereignty by the other over the disputed territory.

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STATEMENT

This action involves a claim of the State of South Dakota to title to a certain island located in the Missouri River, which forms the boundary between the States of Nebraska and South Dakota. Title to this island has historically been recorded in the State of Nebraska. The earliest title record is an 1865 patent deed, effective as of 1864, which was issued by the United States to one Helen Auge and which is recorded in Cedar County, Nebraska. Title and nontitle transactions affecting the island have been recorded in Nebraska ever since that date (App. 36).

South Dakota refers to the existence of several maps, surveys and aerial photographs in its Statement. There are many additional maps, surveys and aerial photographs as well. These documents identify the territory in question as either Island No. 1, Rush Island or Elk Island. All of these maps, surveys and aerial photographs together

show that the Missouri River changed its course numerous times until the middle 1950's when the Gavins Point Dam was constructed several miles upstream by the United States Army Corps of Engineers. Prior to this construction project, the course of the river changed frequently and consequently the main channel of the river also changed. The main channel of the Missouri River ran north of the island during its early history, but after the dam's construction it stabilized south of the disputed island. Since then the island has been located north of the main channel of the Missouri River. The chute of the Missouri River which runs north of the island is presently in part or totally blocked by the Yankton, South Dakota, city dump and there is land access from South Dakota. The island is presently approximately 1000 acres in size and is being farmed by the Nebraska titleholders.

Cedar County, Nebraska, has assessed the island for property tax beginning in the year 1864 through the present except for a period of five years during the 1930's (App. 38 and 40). The island has not been assessed in Yankton County, South Dakota, during at least the last thirty years (App. 41). In 1965, the Director of Equalization of Yankton County, South Dakota, consulted the Attorney General of the State of South Dakota and was advised by an Assistant Attorney General that the tax situs for the land in question was in Nebraska (App. 42).

Children of Charles Broz who resided on the island attended school in Yankton, South Dakota, from 1961 until 1965. In 1965, Mr. Broz was notified by Yankton County, South Dakota officials that he could no longer send his children to Yankton schools unless he paid tuition because

the island was located in Cedar County, Nebraska (App. 45).

The Cedar County, Nebraska, sheriff has on several occasions exercised his jurisdiction upon the island (App. 46 and 48).

In 1958 a petition to quiet title over the island which is now in dispute was filed in the District Court of Cedar County, Nebraska. On November 7, 1958, that court quieted title of the island in predecessors of the present Nebraska titleholders (App. 23). On January 25, 1971, the Circuit Court of the First Judicial Circuit of South Dakota held in a quiet title action filed against the Nebraska titleholders that the chute north of the subject island was the south boundary of Yankton County and the State of South Dakota, and expressly recognized and adopted the earlier decision of the District Court of Cedar County, Nebraska, in 1958 (App. 29). On October 24, 1974, the State of South Dakota, by the Commissioner of School and Public Lands, brought a quiet title action against the Nebraska titleholders, among others, asking that the State of South Dakota be declared the owner in fee simple of the northern portion of the island in question. The defendant Nebraska titleholders moved to dismiss on the grounds that the South Dakota court lacked jurisdiction because the land in question was located in the State of Nebraska. The South Dakota court has not ruled upon this motion. On approximately May 10, 1976, the State of South Dakota filed this Motion for Leave to File Complaint and Complaint. Thereafter, on May 17, 1976, the South Dakota Circuit Court ordered that further proceedings in that case should be stayed until a final determination is made by

this Court as to the location of the exact boundary between Yankton County, South Dakota and Cedar County, Nebraska (App. 33).

ARGUMENT

I.

South Dakota's Motion for Leave to File a Complaint should be denied because the same issues are raised in a pending state court action which provides an appropriate forum.

On October 24, 1974, the State of South Dakota filed an action in the Circuit Court, First Judicial Circuit, County of Yankton, South Dakota, seeking to quiet title in itself to the real estate which is the subject of this action. By an order dated May 17, 1976, and entered June 1, 1976, the South Dakota court stayed the proceedings before it pending a determination of the United States Supreme Court of the exact boundary between South Dakota and Nebraska (App. 33). On approximately May 10, 1976, the State of South Dakota filed its Motion for Leave to File a Complaint in this Court.

This Court should decline to exercise jurisdiction over the case thrust upon it by the South Dakota lower court. This Court has consistently held and has this year reaffirmed that its "original jurisdiction should be invoked sparingly." *Arizona v. New Mexico*, — U. S. —, 48 L. Ed. 2d 376, 379 (1976); *Illinois v. City of Milwaukee*, 406 U. S.

91, 93-94 (1972). In *Arizona v. New Mexico, supra,* this Court in a *per curiam* opinion stated that its original jurisdiction is obligatory only in "appropriate cases." A determination of whether a case is "appropriate" was there said to depend upon two factors: (1) "the seriousness and dignity of the claim;" and (2) "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Arizona v. New Mexico, supra,* 48 L. Ed. 2d at 379. The Court also noted that it must also inquire whether recourse to its jurisdiction is necessary for the state's protection. *Id.* 48 L. Ed. 2d at 379-380, citing *Massachusetts v. Missouri,* 308 U. S. 1, 18-19 (1939).

In *Arizona v. New Mexico,* Arizona sought to have this Court determine the constitutionality of New Mexico's electrical energy tax as imposed on Arizona utilities generating power in New Mexico and retailing it in Arizona. A group of Arizona utilities had brought an action in the New Mexico courts raising the same issues. The Court held that the pending state action provided an appropriate forum for litigation of the issues, even though Arizona was not a party. "If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U. S. C. § 1257(2) [28 U. S. C. S. § 1257(2)]." *Id.,* 48 L. Ed. 2d at 380.

In the present case, an action to quiet title to land has been brought by the State of South Dakota in its own

courts. There is a difficult conceptual question in a case where a state court's jurisdiction is based upon the situs of real property within the state, as is true in a quiet title action, and where there is a question whether the land is in fact located in that state. Nevertheless, it is clear that the state court does have power to determine whether it has subject matter jurisdiction in such a case. *See, e. g., Durfee v. Duke,* 375 U. S. 106 (1963) (State of Missouri must gave full faith and credit to a decision of the Supreme Court of Nebraska holding that disputed boundary land is in Nebraska). The order of the South Dakota court (App. 33) shows that no question has been raised concerning the *in personam* jurisdiction of the South Dakota court in the quiet title action.

In *Durfee v. Duke, supra,* this Court indicated that a quiet title action between private parties would not bind the states involved by a decision that land was located in one state or another. *Id.,* 375 U. S. at 115. In the present case, however, the State of South Dakota is a party before its own court. It would therefore be bound by a decision adverse to its claim that the disputed land is in South Dakota. A decision favorable to South Dakota would be reviewable by this Court upon writ of certiorari under 28 U. S. C. § 1257 (3) because the boundary between the states is set by statute of the United States. Thus, this case does not differ from *Arizona v. New Mexico, supra.* The State of South Dakota should of course be able to rely upon its own courts to protect its interest, thus meeting the criterion of *Massachusetts v. Missouri, supra.*

Moreover, in light of the other concerns for this court's calendar expressed in *Arizona v. New Mexico,* it is

submitted that the possibility of a decision favorable to South Dakota is so slight that, even though the State of Nebraska is not a party there, this Court should give the courts of South Dakota an opportunity to hear the case before it undertakes to hear the matter under its original jurisdiction. In *Arizona v. New Mexico, supra,* this Court noted its concern with "the seriousness and dignity of the claim" and its inclination to "a sparing use of our original jurisdiction." These concerns are in essence the same as those expressed by this Court in cases where refusal to exercise the jurisdiction of federal courts has been upheld where contemporaneous state jurisdiction exists. These cases involve abstention out of consideration "for reasons of wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States,* — U. S. —, 47 L. Ed. 2d 483, 498 (1976).

> "[I]n certain cases . . . the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. [Citations omitted.] Grounds for justifying such a qualification have been found in 'considerations of convenience, sufficiency, and justice' applicable to particular classes of cases." *Massachusetts v. Missouri, supra,* 308 U. S. at 19.

Here we have a case in which the lower courts of both Nebraska and South Dakota have previously entertained quiet title suits concerning this very property. The Nebraska Court by an order dated November 7, 1958, and recorded December 2, 1958 (App. 23), ruled that the property is in Nebraska and quieted title thereto. The South

Dakota court, in an order dated January 25, 1971, and entered May 6, 1971 (App. 29), referred to the earlier Nebraska decree[1] and, apparently in reliance thereon, refused to quiet title in the plaintiff. Thus, the courts of both states have previously decided that the property in question is located within the State of Nebraska.

In view of this history of litigation, the claim of the State of South Dakota cannot be said to have the "seriousness and dignity" which require this Court to exercise its original jurisdiction at this time, and its Motion For Leave to File Complaint should be denied.

II.

South Dakota's Motion for Leave to File a Complaint should be denied as a result of its long acquiescence in the exercise of sovereignty over the island by the State of Nebraska.

In international law it has been the constant and approved practice of nations that uninterrupted possession of territory over a length of time by one nation excludes the claim of every other in order that the rights of nations not remain uncertain, subject to dispute, and ever ready to occasion bloody wars. This Court in the landmark case of *Rhode Island v. Massachusetts,* 45 U. S. (4 How.) 591 (1846), adopted and applied that principle to a dispute between two states concerning the location of their common boundary. The Court, speaking of the long and uninterrupted possession of Massachusetts and the

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1. The South Dakota court mistakenly gave the date of the earlier decree as December 7, 1958.

delays of Rhode Island in alleging any mistake in the boundary, said:

> ". . . Surely this connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." Id. at 639.

This doctrine, known as prescription and acquiescence, has continually been applied to boundary disputes between states since its adoption in 1846. The doctrine most recently was applied in *Ohio v. Kentucky*, 410 U. S. 641 (1973), wherein this Court recognized the soundness and solidity of the doctrine by quoting the following from *Michigan v. Wisconsin*, 270 U. S. 295, 308 (1926), with approval:

> ". . . 'The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority.' . . ." 410 U. S. at 651.

This Court has held that the doctrine of prescription and acquiescence overrides all other doctrines in state boundary disputes. See *Arkansas v. Tennessee, infra.* It has even been held that the doctrine applies even though

the boundary line is based upon mutual mistake by the parties. In *Rhode Island v. Massachusetts, supra,* this Court stated:

> "... More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin." 45 U. S. (4 How.) at 638.

This Court has also held that states are bound by a practical boundary line that has been established by their actions even though the line is not otherwise precisely accurate. *Missouri v. Iowa,* 48 U. S. (7 How.) 660 (1849); and *New Mexico v. Colorado,* 267 U. S. 30 (1925). In the case of *Arkansas v. Tennessee,* 310 U. S. 563 (1940), this Court held that the rule of *thalweg* and the doctrine as to the effect of an avulsion, "may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area." Id. at 571.

It is therefore clear that regardless of where a boundary line would otherwise be located, the actual boundary will be held to be that indicated by the doctrine of prescription and acquiescence, where the conditions necessary to its application have been met.

It is clear from all the cases in which the doctrine of prescription and acquiescence has been considered that there must be two basic conditions present before it will be applied: (1) there must be a continuous and undisput-

ed exercise of sovereignty over a long period of years by one state (prescription), and (2) there must be implied consent by the second state to the exercise of sovereignty by the first state (acquiescence). This Court has considered various factors in order to determine whether these conditions have been fulfilled.

In *Arkansas v. Tennessee, supra,* the State of Arkansas was challenging the jurisdiction over, and the right to possession of, an island which was caused to be moved to the east of the main channel of the Mississippi River by an avulsion of the river in 1821. After the avulsion the land in dispute was, and continued to be for many years, attached to the State of Tennessee. This Court held that the territory in question was within the boundaries of Tennessee by virtue of the acquiescence on the part of Arkansas in the exercise by Tennesse of dominion and jurisdiction over that area. The Court looked to the following acts on the part of Tennessee to establish prescription: inhabitants on the island voted in Tennessee; land transactions and transfers were made under the authority of Tennessee since 1823; inhabitants on the island were taxed in Tennessee at least as far back as 1870; inhabitants on the island were educated in Tennessee; and there was a tax sale by a Tennessee sheriff in 1848. In finding that Arkansas had acquiesced in Tennessee's exercise of sovereignty, the Court relied upon the fact that there had been no showing that Arkansas had ever asserted any claim to the land in controversy prior to the institution of the lawsuit, even though Arkansas had notice of Tennessee's claim to this land almost sixty years prior to the lawsuit.

In *Indiana v. Kentucky*, 136 U. S. 479 (1890), the State of Indiana was contesting Kentucky's right to the jurisdiction over a tract of land known as Green River Island. The Court had previously held, and the states recognized, that Kentucky had jurisdiction to the north bank of the Ohio River. Indiana claimed, however, that Green River Island was on the northern bank of the River and was not, in fact, an island at the critical point in time at which Kentucky became a state and her boundaries were established. Kentucky claimed conversely that a chute of the Ohio River ran north of Green River Island and therefore this island was within its jurisdiction, being south of the north bank of the River. The Court said:

> "But above all the evidence of former transactions, and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty, both as to soil and jurisdiction, over the land. On that day, and for many years afterwards, as justly and forcibly observed

by counsel, there were perhaps scores of living witnesses whose testimony would have settled to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues." Id. at 509-510.

The Court further stated concerning prescription by Kentucky:

> "Whilst on the part of Indiana there was a want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen by the Law declaring the boundaries of her counties on the Ohio River, passed in January, 1810; and there was action taken in the courts of the United States and of the State by parties claiming under her or her grantor, and there was also action by her officers in the assertion of her authority over the land; all of which tends to support the claim of rightful jurisdiction. It at least shows that her claim was never abandoned by her or her people. . . ." Id. at 515.

In addition, the Court stressed the fact that there were two prior adjudications involving private parties, one by a United States Circuit Court and the other by a Circuit Court of the State of Kentucky, holding that the island in dispute was within the jurisdiction of Kentucky. The

Court also took into consideration the fact that numerous grants of titles of land were made by Kentucky and that for half a century the island in question had been assessed for taxes by officers of the State of Kentucky. The Court after considering all these factors concluded as follows:

> ". . . The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it. Id. at 518.

Other cases in which this Court has applied the doctrine of prescription and acquiescence are *Louisiana v. Mississippi,* 202 U. S. 1 (1906); *Virginia v. Tennessee,* 148 U. S. 503 (1893); *Michigan v. Wisconsin,* 270 U. S. 295 (1926); *Maryland v. West Virginia,* 217 U. S. 1 (1910); and *Vermont v. New Hampshire,* 289 U. S. 593 (1933).

Considering all of these cases, it is clear that several factors are especially important in considering whether the doctrine of prescription and acquiescence should be applied. Some of these factors which have been referred to repeatedly in the reported cases are: (1) What state has exercised the taxing authority? (2) In which state does the chain of title exist? (3) In which state have the residents voted? (4) Which state has provided educational services to the residents? (5) Which state provides police protection to the area? (6) What is shown to be the boundary on maps and surveys made of the area? All of these factors are indications of what the litigants and the

people living in the area consider to be the boundary between the two states.

The affidavits which have been submitted in support of this brief clearly show that the people residing in the area on either side of the border, and both the State of South Dakota and the State of Nebraska as well, have always considered the island to be within the jurisdiction of the State of Nebraska. It is the State of Nebraska which has assessed the island for taxation for more than one hundred years (App. 38 and 40), as admitted in plaintiff's Motion for Leave to File Complaint and Complaint (p.7). The State of South Dakota has not done so (App. 41). In fact, it appears that when the Attorney General for the State of South Dakota was specifically asked where the tax situs of the island was to be located in 1965, it was his opinion that "the tax situs for the land in question is still in Nebraska" (App. 43). A complete chain of title exists in the State of Nebraska, dating back to an original deed from the United States in 1865 through the present owners (App. 36). Although the State of South Dakota has indicated in its motion that it has provided educational services, the affidavit of Charles E. Broz (App. 45) states that in 1965 he was required to either withdraw his children from the South Dakota school system or pay tuition because he was living within the State of Nebraska. Such appears to be more than mere acquiescence by the State of South Dakota and may even be considered to be a positive assertion by the state that the island in question is within the jurisdiction of the State of Nebraska. The Sheriff of Cedar County, Nebraska, has exercised jurisdiction over the island on behalf of the State of Nebraska by offering police protection and by

serving process (App. 46) as well as by auctioning the property and issuing a sheriff's deed (App. 48). The affidavit of the former Sheriff of Yankton County, South Dakota, indicates that such police protection and civil services were not provided by the State of South Dakota, at least during his term of office (App. 49). And finally, and perhaps most importantly, we find that a district court of the State of Nebraska has exercised jurisdiction over the island in a quiet title action (App. 23), and conversely, a South Dakota circuit court in 1971 expressly found that the island in question was within the jurisdiction of the State of Nebraska (App. 29). All of this clearly indicates that there has never really been a dispute concerning the jurisdiction over the island in question until the State of South Dakota attempted to claim the island by filing a quiet title action in its own circuit court in 1974, the same court which had earlier found the same island to be within the jurisdiction of the State of Nebraska. All the conditions are present for the application of the doctrine of prescription and acquiescence. Therefore, the State of Nebraska contends it should be applied.

It may appear at first blush that the procedure of asking this Court to summarily rule upon the merits of the complaint in denying plaintiff's motion is inappropriate at this point. However, this Court's original jurisdiction has only been sparingly exercised and should not be exercised in a case which is so clearly nonmeritorious as to be appropriate for summary dismissal. To allow this case to go further would only serve "to delay an adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky, supra* at 644. This reasoning and the resulting departure from common rules

of civil procedure was specifically recognized and approved by this Court in *Ohio v. Kentucky, supra.* Therein the Court stated:

> "Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Const Art III, § 2; 28 USC § 1251 (a), [28 USCS § 1251 (a)]. Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. See United States Supreme Court Rule 9; Rhode Island v. Massachusetts, 14 Pet 210, 10 L Ed 423 (1840). Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. See, for example, Alabama v. Texas, 347 U S 272, 98 L Ed 689, 74 S Ct 481 (1954); California v. Washington, 358 U S 64, 3 L Ed 2d 106, 79 S. Ct 116 (1958); Virginia v. West Virgina, 234 U S 117, 121, 58 L Ed 1243, 34 S Ct 889 (1914). Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." Id. at 644.

Even though this case involves only the jurisdictional boundary between two states and would not on its face determine private property rights, this Court has held that equity and justice demand that the effect on private property rights of individual citizens should be considered, and this in fact is an underlying rationale for the doctrine of prescription and acquiescence. In *Virgina v. Tennessee, supra,* the Court said:

> "There are also moral considerations which should prevent any disturbance of long recognized boundary lines; consideration springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life." Id. at 524.

This Court further stated in *Maryland v. West Virginia, supra,* as follows:

> "Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. . . ." Id. at 46.

If the Court were to determine that the island is within the jurisdiction of the State of South Dakota, it would in effect be destroying private property rights based upon a chain of title in the State of Nebraska dating back in excess of one hundred years. The Attorney General of the State of South Dakota has contended in the quiet title action filed in its circuit court that title to the land is in the State of South Dakota, not in the persons holding title through Nebraska. To allow the State of South Dakota to claim title after nearly one hundred years of silence is clearly contrary to the reasonable expectations of the private property owners who have justifiably relied upon the chain of title found in Nebraska.

CONCLUSION

The State of South Dakota has already brought an action in its own courts seeking to obtain title to the island in question. Prior decisions of the courts of both South Dakota and Nebraska have determined that the island is within the boundaries of the State of Nebraska. The State of South Dakota now seeks to invoke the original jurisdiction of this Court even while it is a party to an action in its own courts involving the same issue. The time of this Court and the resources of the State of Nebraska as a defendant should not be committed to this action until there is some indication that the courts of South Dakota will not follow settled law concerning the situs of this property. If the courts of South Dakota do determine that the island is within South Dakota, that determination can be reviewed by this Court under a writ of certiorari, or an action could then be brought under the original jurisdiction of this Court.

If this Court decides that the present dispute should not be first considered by the courts of South Dakota, the Motion for Leave to File a Complaint should nonetheless be denied because for more than a century South Dakota has acquiesced in the exercise of sovereignty over the island by the State of Nebraska.

Respectfully submitted,

STATE OF NEBRASKA, Defendant,

By PAUL L. DOUGLAS

Attorney General of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68508
Tel. (402) 471-2682

Attorney for Defendant.

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1975

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1975 No. 72, Original

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IN THE
DISTRICT COURT OF CEDAR COUNTY, NEBRASKA

Clyde Gill, Otto Isaak, Wm. Schmoll, and Charles E. Broz,

Plaintiffs.

vs.

The heirs, devisees, legatees, personal representatives, and all other persons interested in the estate of Henry S. Yager, deceased, real names unknown, and all persons having or claiming any interest, right, title, or claim to Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees

east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 east in Cedar County, Nebraska, real names unknown.

Defendants.

———o———

JUDGMENT DECREE

Now on this 7th day of November, 1958, the same being one of the judicial days of the District Court of Cedar County, Nebraska, this cause came on for hearing to the Court.

The Court finds that all of the defendants and each of them were duly served with process in accordance with law, and that each of them has failed to appear, plead or answer, with the exception of the unknown defendants who might be in military service of the United States, who have through their duly authorized attorney, appointed by the Court, answered and filed a general denial to the allegations of plaintiffs' petition.

The Court finds that it has jurisdiction of the subject matter in said cause of action and of all of the defendants made parties to this suit.

The Court finds that the plaintiffs have filed a military affidavit in this cause, and the Court has appointed an attorney to represent such defendants who might be in the military service who have filed an answer herein as hereinabove stated. That all defendants failing to appear, plead or answer are hereby severally found and adjudged in default.

The Court finds that Clyde Gill, one of the plaintiffs in this action, died intestate on the 17th day of September, 1958, and that Ruth M. Gill is his surviving wife, Bonnie Gill Autro his daughter, and Clyde Gill, Jr., his son, are the sole and only heirs at law of said Clyde Gill, deceased, and are the only persons interested as such heirs in the real estate herein described.

That the Court upon application of the other plaintiffs, has entered an order of revivor of said action, reviving said action in the names of Ruth M. Gill, Bonnie Gill Autro and Clyde Gill, Jr. as parties plaintiff in this action in addition to the original plaintiffs, Otto Izaak, Wm. Schmoll and Charles E. Broz.

The Court finds that the original plaintiffs in this action were each the owners of an undivided one-fourth interest in the land involved in these proceedings and that the substituted parties Ruth M. Gill, Bonnie Gill Autro and Clyde Gill, Jr. have become the owners of the share of the said Clyde Gill, deceased.

On consideration of the evidence adduced herein the Court finds generally in favor of the plaintiffs as substituted herein, and that the allegations of their petition are true; that the plaintiffs are the owners in fee simple of the following described real estate, to-wit:

> Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey

recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "A" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska.

The Court further finds that the plaintiffs and their predecessors in title have been in the open, notorious, exclusive, continuous and adverse possession of said real estate for more than ten years immediately prior to the commencement of this action, and during all of said time asserted title to said premises against all persons whomsoever.

It is therefore considered by the Court that the title of the plaintiffs' to said real estate be and the same is hereby quieted and confirmed in the substituted plaintiffs as

each of their interests appear and as hereinabove found as against each of said defendants, and against all persons having or claiming any interest in said real estate, real names unknown, and each and all of them are hereby enjoined forever from asserting any claim or interest in said real estate, or any part thereof, including the unknown children, heirs, devisees, legatees, legal representatives and all other persons interested in the estate of Henry S. Yager, deceased, real names unknown.

The costs of this action are hereby taxed against the plaintiffs herein.

BY THE COURT:

/s/ John E. Newton
Judge

(SEAL)—/s/ Shirley Arens, July 19, 1976

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, the duly elected, qualified and acting Clerk of the District Court of the Eighth Judicial District of the County of Cedar, State of Nebraska, which is a court of record, having a seal, hereby certify that: By law I have the custody of the seal and all records, books, documents, and papers of or pertaining to the court;

The Judgment Decree hereto annexed is a true copy of papers appertaining to the court and on file and of record in the office of the clerk of the court;

I have compared the foregoing copy with the original on file in the office of the clerk of the court; and the same comprises a full, true, and correct transcript therefrom and the whole thereof.

Witness my hand and the seal of the court on 19th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, Clerk of the District Court in and for Cedar County, Nebraska, the same being a Court of record, do hereby certify that the Honorable John E. Newton, whose genuine signature appearing on the foregoing Judgment Decree, was at the time of signing same, a Judge of the District Court of Cedar County, in the Eighth Judicial District of the State of Nebraska, duly qualified and acting, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal at the City of Hartington, in Cedar County, State of Nebraska, this 19th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

State of South Dakota, County of Yankton, ss.

In Circuit Court First Judicial Circuit

ROBERT SCHLAEFLI,

Plaintiff,

vs.

DR. R. J. Foley and DR. OTTO ISAAK,

Defendants.

JUDGMENT

The above entitled action having come on before the court on the 5th day of June, 1970, for trial to the court in the courtroom of the Circuit Court in the courthouse in the City and County of Yankton, South Dakota, and the plaintiff appearing by his attorney James W. Donahoe, of Vermillion, South Dakota, and the defendants appearing by their attorney Everett A. Bogue, of Vermillion, South Dakota, and the court having heard the evidence and having heretofore and on January 14, 1971, rendered a memorandum decision and the court having pursuant to Rule 52 of the South Dakota Rules of Civil Procedure made and entered its findings of fact and conclusions of law which are now on file herein, it is

ORDERED, ADJUDGED AND DECREED as follows:

(a) That the plaintiff is the owner and entitled to the possession of Lots 2, 3 and 4 of Section 15, Township 93, Range 53 in Yankton County, South Dakota, together with accretions thereto extending from the south boundary

thereof to the chute or arm of the Missouri River along the south side of such accretions which said chute or arm of the Missouri River the court adjudges to be the south boundary of Yankton County, and the State of South Dakota.

(b) That the defendants are the owners and entitled to possession of that tract of land bounded on the south by the main channel of the Missouri River and on the north by the chute or arm of the Missouri River which forms the south boundary of the premises owned by the plaintiff, and which is more particularly described in a judgment of the District Court of Cedar County, Nebraska, dated December 7, 1958, in which Clyde Gill et al are plaintiffs and the heirs of Henry S. Yaeger are defendants as

> Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1 East, Cedar County, Nebraska, according to the original government survey and which is more fully and particularly described in the Surveyor's Record No. 5, page 70 as follows: Commencing at the section corner of Sections 7 and 8, in Township 33, Range 1 East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, Page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning designated as "a" on the attached map, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72

degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 dgrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, together with all accretions thereto.

(c) That the plaintiff has no right, title or interest, estate, claim, lien or encumbrance upon the premises included in said island and that plaintiff is forever barred and enjoined from asserting any right, title, interest, estate, claim, lien or encumbrance upon the premises above described or any part thereof adverse to the defendants.

(d) That the defendants have and recover their costs and disbursements herein to be hereinafter taxed by the clerk of this court in the amount of $156.61.

Dated at Yankton, South Dakota, this 25th day of January, 1971.

BY THE COURT:

/s/ C. C. Puckett

Judge

ATTEST:

/s/ Leo Klimisch

Clerk

(SEAL)

State of South Dakota, Yankton County, ss. I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office. 7-19, 1976 /s/ Heather Kuchta, Clerk of Courts, Yankton County. By dp Eleanor Gregg.

Filed May 6, 1971. Leo Klimisch, Clerk of Courts.

Judg. 14, pg. 549-550.

State of South Dakota, County of Yankton, ss.

I, Heather Kuchta, Clerk of the Circuit Court in and for Yankton County, South Dakota, the same being a Court of record, do hereby certify that the Honorable C. C. Puckett, whose genuine signature appearing on the foregoing Judgment Decree, was at the time of signing the same, a Judge of the Circuit Court of Yankton County, in the First Judicial Circuit of the State of South Dakota, duly qualified and acting, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal at the City of Yankton, in Yankton County, State of South Dakota, this 27th day of July, 1976.

/s/ Heather Kuchta

Clerk of the Circuit Court

(SEAL)

In Circuit Court First Judicial Circuit

74-153

State of South Dakota, County of Yankton, ss.

STATE OF SOUTH DAKOTA, BY THE COMMISSIONER OF SCHOOL AND PUBLIC LANDS,

Plaintiff,

vs.

DR. ROBERT J. FOLEY, et al.,

Defendants.

ORDER

The defendants, Dr. Robert J. Foley, Phyllis K. Foley, Dr. Otto Isaak, and Helen H. Isaak, having moved this Court to dismiss Plaintiff's Complaint on the ground that this Court lacks jursidiction to decide this matter, and the above named defendants having further moved this Court for summary judgment against the Defendants Charles W. Schlaefli and Benjamin Schlaefli on their cross claim against the Defendants Foley and Isaak, and the first named defendants having further moved to strike plaintiff's Amended Complaint, and said Motions having come on for hearing on the 11th day of May, 1976, before the Honorable E. W. Hertz and the Defendants Foley and Isaak being represented by Everett A. Bogue, and the Defendants Charles and Benjamin Schlaefli being represented by John R. Kabeiseman, and the State being represented by Steven L. Zinter, and the Court after reviewing all the records and files herein including the Affidavits of Everett A. Bogue, Donald Foreman, and Jesse Roberts, and after hearing the oral arguments of all parties, the Court determined that any further proceedings in this cause should be stayed until a final determination is made by the United States Supreme Court as to the location of

the exact boundary between Yankton County, South Dakota and Cedar County, Nebraska; therefore, it is

HEREBY ORDERED that a decision by this Court on Defendants Foley and Isaak's Motion for Dismissal of Plaintiff's Complaint based on a lack of jurisdiction is hereby withheld and this matter is stayed pending a final determination by the United States Supreme Court as to the location of the boundary between Yankton County, South Dakota and Cedar County, Nebraska; and it is

FURTHER ORDERED that any decision on all other issues raised by the Motion for Summary Judgment and the Motion to Dismiss the Amended Complaint will be reserved and withheld until such time as the United States Supreme Court makes a final determination as to the boundary between Yankton County, South Dakota and Cedar County, Nebraska.

Dated this 17th day of May, 1976.

BY THE COURT:

/s/ E. W. Hertz
Judge

ATTEST:
/s/Heather Kuchta
Clerk of Courts

(SEAL)

State of South Dakota, Yankton County, ss.

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

7-19, 1976. Heather Kuchta, Clerk of Courts, Yankton County.

/s/ By Eleanor Gregg

Filed June 1, 1976, Heather Kuchta, Clerk of Courts

State of South Dakota, County of Yankton, ss.

I, Heather Kuchta, Clerk of the Circuit Court in and for Yankton, South Dakota, the same being a Court of record, do hereby certify that the Honorable E. W. Hertz, whose genuine signature appearing on the foreging Order, was at the time of signing the same, a Judge of the Circuit Court of Yankton County, in the First Judicial Circuit of the State of South Dakota, duly qualified and acting, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and official seal at the City of Yankton, in Yankton County, State of South Dakota, this 27th day of July, 1976.

/s/ Heather Kuchta
Clerk of the Circuit Court

(SEAL)

State of South Dakota, County of Yankton, ss.

I, Heather Kuchta, the duly elected, qualified, and acting Clerk of the Circuit Court of the First Judicial Circuit of the County of Yankton, State of South Dakota, which is a court of record, having a seal, hereby certify that: By law I have the custody of the seal and all records, books, documents, and papers of or pertaining to the court;

The Judgment Decree and Court Order hereto annexed are true copies of papers appertaining to the court and on file and of record in the office of the clerk of the court;

I have compared the foregoing copies with the original on file in the office of the clerk of the court; and the same comprise a full, true, and correct transcript therefrom and the whole thereof.

Witness my hand and the seal of the court on 27th July, 1976.

/s/ Heather Kuchta
Clerk of the Circuit Court

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Edward S. Stevens, being duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am and have been for over 20 years the duly elected County Clerk and Register of Deeds for the County of Cedar, State of Nebraska.

(3) That the Numerical Indexes for land transactions in the County of Cedar, State of Nebraska, are kept in the ordinary course of business and as the Register of Deeds of Cedar County, I am the custodian of such records.

(4) That I have examined the Numerical Indexes for land transactions for the County of Cedar, State of Nebraska, from 1864 to the present and that the indexes show that title and nontitle transactions to the land mass known as Rush and/or Elk Island have been recorded in the County of Cedar, State of Nebraska from 1864 to the present.

(5) Affidavit further states that the above-mentioned Numerical Indexes show a continuous chain of title for Rush and/or Elk Island from 1865 when Helen Auge received a Patent Deed from the United States, through the present Nebraska titleholders, Otto and Helen Isaak and Dr. D. J. and Phyllis H. Foley including a Mechanics Lien affidavit filed by one Larry R. Heine in 1973 and that to

the best of his knowledge all title transactions pertaining to said island have been continually documented in the Numerical Indexes of the County of Cedar in the State of Nebraska.

(6) Affiant further states that to the best of his knowledge all titleholders to said land mass known as Rush and/or Elk Island have been Nebraska titleholders from the original land grant in 1865 to the present.

/s/ Edward S. Stevens

County Clerk and Register of Deeds, County of Cedar, State of Nebraska

(SEAL)

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/ Phyllis Climer

Notary Public

Phyllis Climer, General Notary, State of Nebraska. My Commission expires April 13, 1980.

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, the duly elected, qualified and acting Clerk of the District Court of the Eighth Judicial District of the County of Cedar, State of Nebraska, do hereby certify that Edward S. Stevens whose signature appears to the annexed certificate, was, at the time of signing the same, the duly elected, qualified and acting County Clerk and Register of Deeds of said County of Cedar. That I am acquainted with his handwriting and believe the signa-

ture to be genuine and that all of his official acts as such officer are entitled to full faith and credit.

Witness my hand and Seal of office this 16th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/Phyllis Climer, General Notary, State of Nebraska. My commission expires April 13, 1980.

State of Nebraska, County of Cedar, ss.

I, Roger Schwartz, being first duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am a duly elected County Treasurer for the County of Cedar, State of Nebraska.

(3) That the tax assessment records of Cedar County are kept in the ordinary course of business and that as the duly elected Treasurer of Cedar County, I am the custodian of such records.

(4) That I have examined the tax assessment records for the County of Cedar, State of Nebraska, from 1909 to the present and that the land mass known as Rush and/or Elk Island has continually appeared on the tax rolls of Cedar County from 1909 to the present inclusive with the exception of a brief five year period during the 1930's.

(5) Affiant further states that the land mass known as Rush and/or Elk Island has always been assessed as part of the County of Cedar in the State of Nebraska and that property taxes have continually been collected in the State of Nebraska from 1909 to the present with the exception of the above mentioned period during the 1930's.

(6) Affiant further states that the tax records prior to 1909 are not available to him in that they are no longer stored in the Cedar County Courthouse.

/s/ Roger J. Schwartz

County Treasurer
County of Cedar
State of Nebraska

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/ Edward S. Stevens
Notary Public

Edward S. Stevens, General Notary, State of Nebraska. My Commission expires August 16, 1978.

State of Nebraska, County of Cedar, ss.

I, Edward S. Stevens, County Clerk of Cedar County, State of Nebraska, do hereby certify that Roger Schwartz whose genuine signature appears to the annexed certificate, was at the time of signing the same, the duly elected, qualified and acting County Treasurer in and for the County of Cedar and State of Nebraska. That I am acquainted with his handwriting and believe the signature to the said certificate to be genuine and that all of his official acts as such officer are entitled to full faith and credit.

Witness my hand and Seal of office this 16th day of July, 1976.

/s/ Edward S. Stevens

County Clerk

(SEAL)

Subscribed in my presence and sworn to before me this 16th day of July, 1976.

/s/ Phyllis Climer

Notary Public

Phyllis Climer, General Notary, State of Nebraska. My Commission expires April 13, 1980.

State of Nebraska, County of Lancaster, ss.

I, James Potter, being duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am and have been since 1970 the State Archivist for the State of Nebraska.

(3) That the official tax list records of Cedar County, State of Nebraska, for 1864 to 1908 were transferred from Cedar County to the State Historical Society in Lincoln, Nebraska on June 15, 1973, and that since that date such records have been in my custody.

(4) That I have examined the tax list records for the County of Cedar, State of Nebraska from 1864 to 1908 and that the land mass known as Rush and/or Elk Island has

continually appeared on the tax rolls of Cedar County from 1864 through 1908 inclusive.

(5) Affiant further states that the land mass known as Rush and/or Elk Island has been assessed as part of the County of Cedar in the State of Nebraska from 1864 to 1908 inclusive.

/s/ James E. Potter

State Archivist
Nebraska State Historical
Society, Lincoln Nebraska

Subscribed in my presence and sworn to before me this 14th day of July, 1976.

/s/ John A. Caleca

Notary Public

(SEAL)

State of South Dakota, County of Yankton, ss.

Martin A. J. Slemp, being first duly sworn says that he is the Director of Assessments of Yankton County, South Dakota, and that the land mass which is located in the Missouri River directly south of the Yankton City Dump in Section 16, of Mission Hill Township South has never been included in the assessment records of Yankton County so far as Affiant has been able to determine.

Affiant further says that he checked the assessment record for the last thirty years and cannot find where Yankton County has had this property assessed, has levied any taxes upon it, or attempted to collect any real estate taxes for more than thirty years.

/s/ Martin Slemp
Director of Assessments of
Yankton County, S. D.

Subscribed and sworn to before me this 7th day of July, 1976.

/s/ Everett A. Bogue
Notary Public

(SEAL)

State of South Dakota, County of Yankton, ss.

Martin Slemp, being first duly sworn says; that he is now and was on August 18, 1965, the director of equalization of Yankton County, South Dakota, and that he received the attached letter dated August 18, 1965 from Mr. Alan Williamson, Assistant Attorney General of the State of South Dakota at that time.

Affiant further says that the land to which reference is made in the attached letter is a land mass which exists south of Section 15, 16 and 17, Township 93, Range 55 in Yankton County, and is commonly referred to as Rush Island or Elk Island; that the island is currently and presently north of the main channel of the Missouri River, but that a chute or arm of the river runs along the north side of the island and the south boundary of said sections 15, 16, and 17.

/s/ Martin Slemp

Subscribed and sworn to before me this 8th day of July, 1976.

/s/ Everett A. Bogue
Notary Public

FRANK L. FARRAR
ATTORNEY GENERAL

STATE OF SOUTH DAKOTA
OFFICE OF
ATTORNEY GENERAL
PIERRE

August 18, 1965

Mr. Martin Slemp
Director of Equlaization
Yankton County
Yankton, South Dakota

Dear Mr. Slemp:

When you were in the office last week you consulted me with reference to the tax situs of certain land which had been by the change of the channel of the Missouri River attached to South Dakota.

You advised that in the flood of '52 and prior years' floods the channel of the Missouri River was changed to the south, and that the original channel or main channel stream of the river is now dry.

I have done some research on this subject and find that this land was attached to South Dakota by reason of "avulsion" which means a sudden change in the channel of the river.

It has been held in the case of State of Nebraska v. State of Iowa. 143 US 359, 36 L Ed. 186; State of Missouri v. State of Nebraska, 196 US 23, 49 L Ed. 372 and State of Arkansas v. State of Tennessee, 246 US 158, 62 L Ed. 638 that:

> " 'avulsion' is a rapid change in the course or channel of the river and does not work any change in the boundary, which remains as it was in the center of the river though no water is flowing therein."

From the facts you have given it is my opinion that the tax situs for the land in question is still in Nebraska as the land is south of the middle of the channel of the Missouri River as it existed when Nebraska was admitted to the Union as a state.

The only way this could finally be determined is by an agreement between

the State of Nebraska and South Dakota approved by Congress or by the Supreme Court of the United States in a case against the State of Nebraska.

I am sorry that I am unable to give you more pleasant news.

Yours very truly,

Alan Williamson

Alan Williamson
Assistant Attorney General

AW:sjb

owners of the land. 1966
Otto Sowe

State of South Dakota, County of Turner, ss.

Charles E. Broz being first duly sworn says:

He was the owner of a fractional interest in Rush Island from about 1955 to 1966 when he sold his interest to Dr. Otto Isaak. He lived on the island with his family from about 1961 to 1966. We were the only family who lived on the island while we were there.

We had four children who attened the Yankton public schools but in 1965 we were notified by the Yankton County authorities we could no longer send our children to Yankton schools unless we paid tuition because the island where we lived was in Cedar County, Nebraska. We then sold out and moved away.

I do not remember that either I or my wife Shirley ever voted in Yankton County after we moved on the island.

When we first moved on the island there was a clear running stream between the mainland and the island—it was about four feet deep and 75 to 100 feet wide. There was good fishing and boating in this stream between the South Dakota shore and the island. Our children swam in this stream. But about 1960 Yankton and the city dump emptied refuse and dirt into the stream until it was eventually closed. Yankton County authorities never exercised any authority or control over the island. The State of South Dakota never exercised any jurisdiction over hunting, trapping, or hunting on the island to my knowledge.

The island was generally reputed to be in Cedar County, Nebraska.

While I lived on the island we built a crossing from the South Dakota shore that is still there. We made application to the Corps of Engineers to build the crossing. We put a large tube (about 42 inches) in the crossing to permit the free flow of water in the stream that ran between the island and the South Dakota shore. The stream continued to flow until it was closed by the action of the Yankton city dump in dumping all kinds of refuse in the stream.

I fenced in the entire island in 1961 along the north side of the island and I and my coowners occupied it to the exclusion of any other person.

/s/ Charles E. Broz

Subscribed and sworn to before me this 14th day of July, 1976.

/s/ Everett A. Bogue

(SEAL)

State of Nebraska, County of Cedar, ss.

I, John Riibe, being duly sworn upon oath do depose and state:

(1) That I am a citizen and resident of the State of Nebraska.

(2) That I am and have been for the past seventeen years the duly elected County Sheriff for the County of Cedar, State of Nebraska.

(3) That I have exercised jurisdiction over the land mass known as Rush and/or Elk Island during the past

seventeen years in the name of the County of Cedar, State of Nebraska.

(4) That during that time I have served process on said land mass in the name of the State of Nebraska, specifically serving process on the following occasion:

(a) To Larry R. Heine, living at his usual place of residence, on November 30, 1973. This area known to me as Rush and/or Elk Island.

(5) Affiant further states that on Monday June 24, 1974 answered a call concerning a disturbance on said island and investigated such complaint on the island.

(6) Affiant further states that to the best of his knowledge the State of Nebraska has maintained exclusive jurisdiction over the land mass known as Rush and/or Elk Island during his seventeen years in office.

/s/ John F. Riibe

Cedar County Sheriff

Subscribed in my presence and sworn to before me this 20th day of July, 1976.

/s/ Phyllis Climer

Notary Public

Phyllis Climer, General Notary, State of Nebraska. My Commission Expires April 31, 1980.

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Shirley Arens, the duly elected, qualified and acting Clerk of the District Court of the Eighth Judicial District of the County of Cedar, State of Nebraska, do hereby cer-

tify that John F. Riibe, whose genuine signature appears to the annexed certificate, was at the time of signing the same, the duly elected, qualified and acting County Sheriff in and for the County of Cedar in the State of Nebraska. That I am acquainted with his handwriting and believe the signature to the said certificate to be genuine and that all of his official acts as such officer are entitled to full faith and credit.

Witness my hand and seal of office this 19th day of July, 1976.

/s/ Shirley Arens
Clerk of the District Court

(SEAL)

State of Nebraska, County of Cedar, ss.

I, Rita J. Stevens, duly appointed Deputy County Clerk of the County of Cedar, State of Nebraska, do hereby certify that records of deeds issued by the sheriff's office pursuant to order of sale are kept in the custody and control of the County Clerk's Office; that I have examined such records and such records indicate that Ralph E. Clements, County Sheriff of Cedar County, Nebraska, did sell, as duly directed, and did issue a deed on May 2, 1950 for the following described property:

> Accretion to part of Section Five (5), Township Thirty-three (33), Range One East (1E) of the 6th P. M., Cedar County, Nebraska, containing Ten (10) acres; also described as follows: Rush Island, Cedar County, Nebraska as surveyed, platted and recorded.
>
> Witness my hand and seal of office this 19th day of July 1976.

/s/ Rita J. Stevens
Deputy County Clerk

(SEAL)

State of South Dakota, County of Yankton, ss.

AFFIDAVIT

Ed Sampson, being first duly sworn says; that he was sheriff of Yankton County, South Dakota from the year 1957 to the year 1967 and that during the time he was sheriff his office exercised no dominion or control over Rush Island or Elk Island southeast of Yankton, and at no time attempted to serve process upon any resident thereof.

/s/ Ed Sampson

Subscribed and sworn to before me this 10th day of July, 1976.

/s/ Everett A. Bogue
Notary Public
